

U.S. Department of Labor

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Issue Date: 07 June 2004

Case No.: 2003-LHC-02102

OWCP No.: 01-154326

In the Matter of

EDWARD ST. AMANT
Claimant

v.

ELECTRIC BOAT CORPORATION
Employer

and

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS
Party-in-interest

Appearances:	Stephen Embry, Esquire For Claimant	Kevin C. Glavin, Esquire For Employer
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Before: Janice K. Bullard
Administrative Law Judge

DECISION AND ORDER

This proceeding involves a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.* (the "Act"), and the regulations promulgated thereunder. A hearing was held before me in New London, Connecticut on December 3, 2003. On April 15, 2004, Employer submitted a brief. On April 15, 2004, the Director submitted a brief. On April 19, 2004, Claimant submitted a brief. Claimant and Respondent submitted reply correspondence to each other's briefs.

I. STIPULATIONS AND CONTENTIONS OF THE PARTIES

The parties entered into the following stipulations. (Tr. 8-9., Pre-hearing statements, and filings of the parties.)¹

1. The parties are subject to the Act.
2. Claimant's claim was timely filed and all notice requirements of the Act were met.
3. An employer-employee relationship between Employer and Claimant existed at the time of the injury.
4. Claimant has suffered an injury.
5. Claimant's average weekly wage at the time of injury was \$466.91.

Claimant alleges that he was exposed to a variety of airborne pulmonary irritants, including asbestos dust and fibers, while employed by Employer. Claimant alleges that because of the exposure he is suffering from asbestosis and chronic obstructive pulmonary disease (COPD). Tr. 15. Employer contends that Claimant's employment with Employer in no way contributed to his pulmonary problems and that he suffers only from COPD caused by cigarette smoking, and not asbestosis. Tr. 15-16.²

II. ISSUES

1. Whether Claimant suffers from work-related asbestosis.
2. If asbestosis is present, what is the extent of Claimant's disability?
3. Whether Claimant's claim should be dismissed under section 33 of the Act.
4. Whether section 8(f) of the Act applies in this claim.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Summary of the Evidence

1. Claimant's Testimony

Claimant testified that beginning in 1949, he had served in the Navy for 5 years as a reservist, working primarily as a mechanic. Tr. 17. While in the Navy, Claimant was exposed to

¹ The following abbreviations are used. "CX" refers to Claimant's Exhibits; "EX" refers to Employer's Exhibits; and "Tr." refers to the transcript of the December 3, 2003 hearing.

² Employer moved to dismiss the claim pursuant to section 33 of the Act. In order to rule on the motion it was necessary to adjudicate the claim as certain issues, including whether the Claimant was a "person entitled to compensation" under section 33 of the Act and the amount of compensation to which the Claimant would be entitled, needed to be resolved. The motion to dismiss is addressed in subsection 4 of the discussion.

airborne dust from boilers and machinery in the engine room. Tr. 18. Claimant stated that after his discharge from the service, he worked for a short period of time in a cotton mill where he was not exposed to dust or fumes. Tr. 18. After this, Claimant worked for about 5 years in the heating industry, primarily servicing oil burners and installing heating systems. Tr. 18-19. Claimant stated that this work exposed him to dust and some asbestos. Tr. 19. Claimant testified that he then went to work for Employer, which employed him for 33 years. Tr. 19. Claimant stated that he first started working in the engine rooms of boats under construction, and after one year transferred to the nuclear department where he worked for about 20 years. Tr. 19. Claimant stated that he was transferred to Quincy Shipyard for one year before coming back to Employer. Tr. 21. Claimant stated that for his last 12 years of employment, he worked at Employer's Quonset facility located on the Narragansett Bay. Tr. 22.

Claimant stated that when he first started his employment with Employer, he worked as a pipe fitter, insulating pipes with asbestos. Tr. 22-24. Claimant testified that the engine rooms became quite dusty from the asbestos and the room also filled with smoke from the engines. Tr. 24. Claimant stated that dust was created when the asbestos was cut with knives before being fitted. Tr. 25. Claimant testified that he routinely worked around people who were handling asbestos. Tr. 25. Claimant testified that he was exposed to welding fumes. Tr. 27. Claimant stated that he was also exposed to dust from the grinding machines. Tr. 30. Claimant stated that he was exposed to dust and fumes from the removal and application of paint. Tr. 32. Claimant stated that when he blew his nose, he could see that his mucus was darkened by the dust. Tr. 32. Claimant was also exposed to asbestos dust, grinder dust and welding fumes while working in the nuclear department. Tr. 35-39. Claimant testified that he started smoking in the Navy one pack per day and quit around 1991. Tr. 40. Claimant retired from the shipyard in February 1991. Tr. 44. Afterwards, he took a job as a substitute teacher for one year and has been retired since then. Tr. 44.

Claimant stated that he has shortness of breath after walking only 150 yards. Tr. 46. He also stated that he has severe difficulty climbing stairs. Tr. 46. Claimant stated that he has difficulty lifting heavy objects because of his shortness of breath. Tr. 47. When he bends over, he experiences shortness of breath. Tr. 47. Claimant stated that he is currently taking medications for cholesterol, blood pressure, prostate treatment, thyroid and has used an inhaler for breathing for four or five years. Tr. 48-50. Claimant testified that he had experienced a bout of pneumonia that caused scarring in his lungs. Tr. 60. Claimant stated that he retired from the shipyard in February 1991 and took a job as a substitute teacher for approximately one year. Tr. 44. He stated that he has not worked since. Tr. 45.

2. Medical Evidence

Yard Hospital Chest X-Ray Interpretation (CX 1)

In conjunction with Claimant's severance physical examination on January 5, 1990, Dr. Rodolfo Zaldivia took an X-ray of Claimant's chest that showed an impression of "[m]ild chronic interstitial lung changes, particularly in both lung bases. Left upper lobe minimal old scarring. Aortic arteriosclerosis."

Dr. K. Nicholas Tsiongas (CX 2, CX 7)

The physician submitted an August 10, 2001 report based on his June 26, 2001 physical evaluation of Claimant, and also testified at deposition on July 30, 2003. The doctor stated that he had worked in the field of occupational health since 1989 and received his board certification in occupational health in 1995. CX 7 at 3. The physician estimated that 5 to 10 percent of his practice relates to lung disease. Dr. Tsiongas testified that he was aware of Claimant's general occupational history and his exposure to asbestos. CX 7 at 6. The doctor's report documented Claimant's military service and his work history with Employer. CX 2. The doctor's physical examination of the Claimant showed "decreased breath sounds throughout, although there were some overlying fine crackles at both bases". A pulmonary function study performed at the office was "consistent with both moderate obstruction as well as a mild restrictive defect." CX 7 at 7-8.

The report noted Claimant's complaints of shortness of breath and also noted a 45-pack-year smoking history. CX 2. A pulmonary questionnaire indicated frequent chest illness and cough. CX 2. The Claimant's medical history includes surgeries for GI endoscopies, cholecystectomy and left hernia repair. CX 2. Claimant was also hospitalized in "1991 for a right heart MI with cardiac arrest with subsequent findings of reversible ischemia on thallium stress test in 1993 and echocardiographic findings of hypokinesis[.]" CX 2. A list of Claimant's illnesses included "diverticulosis, hiatal hernia, prostatic enlargement, high blood pressure, and COPD." CX 2. A physical examination of the Claimant indicated "decreased breath sounds generally and some fine crackles at both bases." CX 2. Two CT scans demonstrated pleural thickening as well as calcified pleural thickening. CX 2. The scans also revealed "some scattered nodularity which is felt to be subpleural at the right base." CX 2. A pulmonary function study indicated "moderate obstruction and low vital capacity." CX 2. A B-reader examination indicated "small parenchymal opacities primarily in the lower 2/3 of the right lung field, consistent with a 1/0 profusion." CX 2. The physician's assessment states:

Mr. St. Amant is a gentleman who has demonstrated occupational exposure over his career to asbestos fiber. He also has a 45-pack-year smoking history and a pulmonary function test consistent both with emphysema and with restrictive disease. Indeed on physical examination the patient was tachypneic even in the relating of his medical history. A prior chest film, his current B-reader, and a CT scan of the chest are all supportive of both pleural and parenchymal asbestos disease. Within a reasonable degree of medical certainty, Mr. St. Amant has both pleural and parenchymal asbestos disease. CX 2.

The doctor reviewed medical records that included findings of objective reports: the report of a May 14, 1999 X-ray showed "findings consistent with COPD and probable chronic parenchymal and pleural changes[.]" CX 2. An April 14, 1984 chest X-ray was interpreted to indicate "COPD with bilateral fibrosis with two small nodular densities in the left midlung." A March 4, 1993 stress test was "consistent with reversible myocardial ischemia in both the inferior wall and septum." CX 2. A February 2, 1999 CT scan of the chest revealed "a 1cc calcified nodule consistent with a granuloma in the left upper lobe, focal scarring in the lingual, right upper lobe and right middle lobe; focal pleural thickening in the right and left thoraces; and

calcified pleural plaquing in the anterior aspect of the left and mid upper thorax ‘which can be seen with asbestosis’.” CX 2. An October 10, 1999 CT scan of the chest revealed “extensive chronic pleural disease consistent with asbestosis.” CX 2. A discharge note dated November 20, 1991 documented “an admission for an acute MI with ventricular irritability that in the CCU developed into an acute ventricular tachycardia and eventually ventricular fibrillation.” CX 2.

The physician also noted a B-reading by Dr. David Kern of a February 22, 1999 film that revealed “some small parenchymal opacities primarily in the lower lung fields on the right, consistent with a 1/0 profusion” as well as pleural thickening. CX 7 at 11. The doctor wrote:

Again, as early as 1999, the radiologist felt there were probable chronic parenchymal changes in this gentlemen, specifically, in the lower, mid to lower lung field bilaterally, which was also confirmed on the CT scan at least in the area of the right lung in 1999. Asbestos parenchymal abnormalities tend to be situated more in the mid and lower lung fields. And I think that x-ray report and CT scan report, in my estimation, is anatomically consistent where I would expect some parenchymal abnormalities from asbestos disease.

CX 7 at 13. Dr. Tsiongas testified that “within a reasonable degree of medical certainty the Claimant suffers from pleural and parenchymal asbestos disease. CX 7 at pg. 12.

X-Ray Report (CX 3)

This interpretation of a May 5, 1999 X-ray by Dr. Susan Daum was given a film quality rating of 3 with a “bad copy” notation. The report indicated small opacities with ½ profusion. The report also indicated pleural thickening.

X-Ray Report (CX 4)

A May 14, 1999 chest X-ray interpretation by Dr. Kathleen Staudinger revealed evidence of “COPD with what is probably parenchymal and pleural scarring in the mid to lower lung regions bilaterally.”

CT-Scan of Chest (CX 5)

A February 26, 1999 CT scan report by Dr. Mark O. Light revealed a “10 mm partially calcified nodule that corresponds to the density seen on the chest X-ray of 2/22/99. This is most consistent with granuloma.” The report also found “moderate parenchymal scarring in the left upper lobe[.]” The report also noted findings of lung scarring and pleural thickening.

CT-Scan of Thorax (CX 6)

An October 30, 1999 CT-scan report by Dr. Nicholas Iannuccilli found “evidence of coronary artery calcification.” The scan found “multiple areas of pleural thickening and pleural

calcification[.]” The report stated that there “is no evidence of rounded atelectasis or other complicating process associated with asbestosis.” There is also evidence of “[m]oderately advanced COPD.” The impression is stated as “extensive chronic pleural disease consistent with asbestosis. COPD. ASCVD.”

Dr. Michael B. Teiger (EX 1, EX 2)

The doctor examined Claimant on July 8, 2003, and issued a report on July 13, 2003 that incorporates the results of his examination, and his review of medical records and the August 10, 2001 medical report by Dr. K. Nicholas Tsiongas. Dr. Teiger was also deposed on September 25, 2003 and testified that he was board certified in pulmonary disease. EX 2 at 5. The doctor noted that Claimant’s chief complaint was “dyspnea with exertion and decreased exercise tolerance”, and he also told the doctor that he was unable to garden or even tie his shoes because of difficulty catching his breath. EX 1. The report noted the Claimant’s medical history including cardiac arrest, cholecystectomy and hypertension. EX 1. The report also noted a smoking history of one pack per day for approximately 40-45 years, with cessation 13 years previously. EX 1. Dr. Teiger also documented Claimant’s employment with Employer for 34 years, which exposed him to “heavy asbestos”. EX 1.

The doctor’s examination of the lungs revealed “generally decreased breath sounds on both the right and left sides” with no rales. EX 1. A pulmonary study “demonstrated no signs of restrictive lung disease.” EX 1. A chest X-ray found “pleural plaque seen *en face* in the left upper lobe.” EX 1. The physician testified that the finding of such plaque does not equate to a diagnosis of asbestosis. EX 2 at 15. The doctor stated that he did not think that the parenchyma was abnormal. EX 1. The physician diagnosed Claimant with COPD, of which emphysema was identified as a prominent component; past cardiac arrest, cholecystectomy, hernia, hypertension, hypercholesterolemia and chronic left knee pain. EX 1. Dr. Teiger concluded:

Under the AMA Guide to the Evaluation of Respiratory Impairment, 5th edition, 2001, and reasonable medical judgment, I believe that this man, at this time, has at least moderate clinical impairment rating for both the lungs and for the whole person based on his present clinical presentation. In consideration of the result of his pulmonary laboratory findings, he should probably be given a 40-50% partial disability of the whole person and both lungs. I personally believe that this disability has been caused by his smoking entirely and not by any occupational exposure. I believe that his overall condition can be expected to worsen only on the basis of the natural aging process.

EX 1. When asked to be more specific as to the Claimant’s percentage disability, the physician stated that he “would have no problem considering that he had a 50 percent disability.” EX 2 at 30.

Dr. Milo Fox Pulde (EX 3, EX 4)

The September 20, 2003 medical report submitted by Dr. Pulde is based on the Claimant’s medical records, a July 13, 2003 evaluation by Dr. Teiger, and the August 10, 2001

report by Dr. Tsiongas, CT scans and chest X-rays. EX 3. Dr. Pulde was also deposed on November 24, 2003 and stated that he is board certified in internal medicine. EX 4 at 5. The physician found the Claimant to be suffering from “tobacco related chronic obstructive lung disease.” The report noted Claimant’s asbestos exposure which resulted “in probable asbestos related pleural plaques, but with no evidence of parenchymal asbestosis, an asbestos related lung disorder, or an asbestos related pulmonary disability by pulmonary function tests[.]” EX 3. The physician stated that the Claimant’s pulmonary difficulties were “exclusively a consequence of his tobacco-related chronic obstructive disease[.]” EX 4 at 6.

The evidence also supports the diagnosis of reportedly intermittent, infrequent, indirect and direct, moderate, and unprotected asbestos exposure from 1956 to 1961 resulting in asbestos related pleural plaques, but no evidence that Mr. St. Amant’s workplace exposure from 1956 to 1990 caused or contributed to the development of parenchymal asbestosis or an asbestosis related pulmonary disability.

EX 3 at 15-16.

Dr. Pulde stated that the Claimant’s pulmonary study demonstrated obstructive lung difficulties with no restrictive lung disease. EX 4 at pg. 7. He concluded that the Claimant has pleural disease from his asbestos exposure, but did not have asbestosis. EX-4 at pg. 9. The physician opined that pleural plaques do not result in lung impairment and are not considered a functional disorder. EX 4 at pg. 9. He stated further that the Claimant does not have asbestosis under the guidelines for diagnosing the disease from the American Thoracic Society and the American review of Respiratory Disease. EX 4 at pg. 9-10. The physician stated that he did not physically examine the Claimant. EX 4 at pg. 11. He also stated that given the latency period of asbestos, if the Claimant was going to have developed an “asbestos-related parenchymal sort of fibrosis, we would have already seen it on his chest x-ray[.]” EX 4 at pg. 41.

3. Third Party Settlement Evidence

Documents Relating to H.K. Porter Bankruptcy Settlement (CX 8)

A November 3, 1999 letter to Mr. Gene Netze from Stephen Embry states that it “should be taken as notice pursuant to 33 U.S.C.[sic]933 of our intention to enter into settlements on the following claims regarding the H.K. Porter bankruptcy.” The letter states that it will treat Employer’s silence as authority to proceed with settlements.

A March 1, 2000 letter to Mr. Gene Netze from Steven Embry that lists certain individuals to whom H.K. Porter Company agreed to pay certain amounts.

A January 9, 2004 letter to District Director Richard Robilotti from Stephen Embry including the executed original LS-33’s and corresponding accountings for Claimant’s settlement with H.K. Porter. Enclosed are three LS-33 forms. The first form authorizing settlement was signed by Douglas Peachy on December 23, 2003 and Stephen Embry on January 9, 2004. The second form did not contain a signature from Douglas Peachy, but was signed by Claimant on

October 10, 2002. A third LS-33 relating to the H.K. Porter matter contains only the signature of the Claimant.

Affidavit of Tracy Vollrath (CX 9)

The affidavit sworn on January 29, 2004 by Tracy Vollrath, a paralegal with Embry & Neusner states in pertinent part:

On or about December 11, 2003, I prepared a substitute LS 33 regarding a claim for Mr. Edward St. Amant against H.K. Porter and sent it by U.S. mail to Electric Boat Corporation. Shortly thereafter I received a telephone call from Sylvia Adams at Electric Boat inquiring as to why we were submitting a duplicate LS 33 on Mr. St. Amant. Ms. Adams indicated that Electric Boat's computer records indicated that they had approved the LS 33 and their records indicated that they had agreed upon a future credit for the H.K. Porter matter. I informed her that this matched our understanding, but that we could not find the form signed by Attorney Peachy and asked her to send me a copy of her signed LS 33. She agreed to do so. A few days later she advised me that they could not find the signed LS 33 either and that she would give the substitute to Attorney Peachy for his signature. I received a substitute LS 33 on or about January 9, 2004 signed by Attorney Peachy.

Attached to the affidavit is an LS-33 form approving a settlement between Claimant and H.K. Porter. The form was signed by Douglas Peachy, dated December 23, 2003 and signed by Stephen Embry and dated January 9, 2004.

Fourth Amended Creditor's Committee Point of Reorganization for H.K. Porter (CX 10)

A letter to Stephen Embry states that H.K. Porter Asbestos Trust has assumed liability for all asbestos claims against H.K. Porter. The Fourth Amended Creditor's Committee Point of Reorganization for H.K. Porter details the company's bankruptcy reorganization plan. Also included are the company's articles of incorporation and its asbestos claims resolution procedures.

Approval of Compromise of Third Person Cause of Action Forms (EX 5, EX6, EX 7)

Three LS-33 forms were submitted by Employer. The first form, which is not signed by a representative from Electric Boat, shows a settlement in the amount of \$172.50 between Claimant and H.K. Porter. EX 5. The second LS-33 form, signed by a representative from Employer shows a settlement in the amount of \$585.00 between Claimant and Eagle Picket. EX 6. The third LS-33 form, signed by a representative from Employer, shows a settlement in the amount of \$1900 between Claimant and Met Life. EX 7.

Affidavit of Douglas Peachey (EX 8)

The affidavit, sworn on January 15, 2004 by Douglas Peachy, Senior Assistant General Counsel for Employer states in pertinent part:

For the last five years, I have been and continue to be the sole and exclusive signatory on behalf of Employer, Electric Boat Corporation, regarding Longshore and Harborworkers Act Section 33 Releases. Attached hereto and made a part hereof is a copy of an LS-33 that was not signed by me to authorize settlement by Employer, Electric Boat.

B. Discussion

Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). Disability is defined under the Act as an “incapacity to earn the wages which the employee was receiving at the time of the injury in the same or any other employment.” 33 U.S.C. § 902 (10). Therefore, for Claimant to receive a disability award, he must establish both an economic loss and a physical (or psychological) impairment. Sproul v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Permanent disability is a disability that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. Watson v. Gulf Stevedore Corp., 400 F.2d 649, 654 (5th Cir. 1968). The permanency of any disability is a medical rather than an economic concept. Generally, a claimant has the burden of proving the nature and extent of his disability. Trask v. Lockheed Shipbuilding Construction Co., 17 B.R.B.S. 56, 60 (1980).

Claimant alleges permanent and partial disability based on his exposure to asbestos and various fumes while employed by Employer. Tr. 15. Claimant testified to his severe breathing difficulties and his pulmonary impairment was corroborated by chest X-rays and the medical report of Dr. Tsiongas. Employer concedes that Claimant suffers from pulmonary disease but that the cause of the disease is not work-related. Tr. 16. In a report submitted by Employer, Dr. Michael Teiger concluded that the Claimant was partially disabled from 50% pulmonary impairment under the AMA Guide to the Evaluation of Respiratory Impairment, which he attributed to his cigarette smoking. EX-1, EX-2. Dr. Teiger’s assessment is unrefuted by contrary medical opinion, and supported by the objective record. Pulmonary function studies revealed moderate obstruction and low vital capacity. CX-2. Chest X-rays showed fibrosis in the lungs, and CT scans performed in 1999 revealed scarring in the left lung and pleural thickening in the right. Id. I find that the record reflects that Claimant’s pulmonary disease constitutes a permanent disability. The issue of causation of the Claimant’s pulmonary condition remains an issue for adjudication herein.

SECTION 20 (a) PRESUMPTION

Coverage under the Act is presumed in accordance with § 20(a) in the absence of substantial evidence to the contrary. Claimant bears the burden of establishing entitlement to the § 20(a) presumption by establishing a prima facie case. To establish the presumption, Claimant need show that he (1) suffered an injury, harm, or pain and (2) working conditions existed that could have caused the harm. U.S. Industries/Federal Metal v. Director, OWCP, 455 U.S. 608

(1982). An employer may refute the presumption by establishing the lack of a causal nexus. Dower v. General Dynamics Corp., 14 BRBS 324 (1981). If the § 20(a) presumption is successfully rebutted, it falls out of the case and all of the evidence must be weighed to resolve the causation issue. Hislop v. Marine Terminals Corp., 14 B.R.B.S. 927 (1982).

In this case, it is clear and uncontroverted that Claimant was exposed to asbestos while he worked for Employer, and the evidence establishes that he has developed some physiological changes in the lung as a result of that exposure. A May 5, 1999 X-ray indicated small opacities with ½ profusion. CX 2. A May 14, 1999 chest X-ray interpretation found “COPD with what is probably parenchymal and pleural scarring in the mid to lower lung regions bilaterally.” CX 4. A CT scan report dated October 30, 1999 stated an impression of “extensive chronic pleural disease consistent with asbestosis.” CX 6. Dr. Tsiongas examined Claimant on June 26, 2001 and noted decreased breath sounds and pleural thickening. CX 2. Accordingly, I find that Claimant has established entitlement to the § 20 (a) presumption of the establishment of a prima facie case.

Once the § 20 (a) presumption applies, the burden shifts to the party opposing entitlement to present substantial evidence proving the absence of, or severing the connection between, the harm and employment or working conditions. Ranks v. Bath Iron Works Corp., 22 BRBS 301, 305 (1989).

REBUTTAL OF THE SECTION 20 (a) PRESUMPTION

Employer submitted the medical reports of Dr. Teiger and Dr. Pulde. Dr. Teiger found evidence of pleural plaques but stated that such a finding does not equate with a finding of asbestosis, but does indicate exposure to asbestos. EX 2 at 18. The doctor explained:

Diagnosis of asbestosis specifically means scarring of the lung parenchyma, which is scarring of the meat of the lung or the alveoli interstitial portion of the lung. Asbestosis specifically refers to the abnormality that occurs within the lung tissue itself. Pleural plaque, on the other hand, is a finding of thickening of the membrane surrounding the lung and in no way equates to a disease of the lung tissue.

EX 2 at 14. Based on his examination, Dr. Teiger doctor concluded that Claimant suffered only from chronic obstructive pulmonary disease (COPD) and emphysema caused by 40-45 pack years. Id. Dr. Teiger testified that asbestosis is a restrictive impairment and said he did not find evidence of restrictive impairment. EX 2 at 17.

Dr. Pulde stated that Claimant’s principal pulmonary diagnosis is “chronic obstructive pulmonary disease secondary to tobacco abuse with emphysema . . . with probably asbestos-related pleural plaques, with no evidence of parenchymal asbestosis or any pulmonary impairment secondary to asbestos related disorder.” EX 4 at 5. Dr. Pulde observed that Claimant’s asbestos exposure occurred primarily during the period from 1956 to 1961. EX 3. The physician found no evidence of restrictive airway disorder. EX 4 at 10. He stated that pleural plaques do not produce any functional impairment.

EX 3. Although Dr. Pulde has understated the length of time Claimant was exposed to asbestos, he acknowledges some exposure, and nevertheless attributes Claimant's pulmonary impairment to tobacco abuse.

I find that the unequivocal opinions of Dr. Pulde and Dr. Teiger constitute evidence that tends to sever the potential causal connection between the asbestos exposure and Claimant's lung impairment. Accordingly, I find that Employer has provided sufficient substantial evidence to rebut the § 20 (a) presumption of work-related harm.

EVALUTION OF THE EVIDENCE

Once the presumption is overcome by the introduction of substantial evidence, the fact-finder must evaluate all of the evidence and reach a decision based on the record as a whole. Del Vecchio v. Bowers, 296 U.S. 280 (1935); Glover v. Aerojet-General Shipyard, 6 BRBS 559 (1977). In evaluating the evidence, the fact-finder is entitled to weigh the medical evidence and draw his own inferences from it and is not bound to accept the opinion or theory of any particular medical examiner. Todd Shipyard Corp. v. Donovan, 300 F.2d 741 (5th Cir. 1962). The burden is upon Claimant to show by a preponderance of the evidence that he suffers from asbestosis as a result of asbestos exposure while employed by Employer.

The evidence that most strongly supports Claimant's contention that he has asbestosis is found in the objective test results. The radiologist who interpreted the results of a CT scan performed on February 26, 1999 found thickening and calcified pleural plaques that "can be seen in asbestosis". CX-5. The radiologist who interpreted the CT scan of October 30, 1999, had the impression of "extensive chronic pleural disease consistent with asbestosis..." CX-6. A chest X-ray from May 14, 1999 produced the impression of chronic parenchymal and pleural changes. CX-4. A chest X-ray taken on January 5, 1990 found mild chronic interstitial lung changes in both lung bases. CX 1. Despite these remarks on objective testing, the record is devoid of an unequivocal diagnosis for asbestosis. In fact, given the objective evidence, the strongest medical opinion supporting the presence of asbestosis can be inferred from statements by Dr. Teiger, who limited his diagnosis to COPD from smoking. Dr. Teiger testified that in evaluating whether an individual had asbestos related lung disease, a finding of interstitial changes in the mid-lower lung field is important. EX 2 at 25. The doctor also asserted that the existence of parenchymal abnormalities would be consistent with asbestosis, though he maintained that he saw no such abnormalities. EX 1. Further, Dr. Teiger stated that a "[d]iagnosis of asbestosis specifically means scarring of the lung parenchyma, which is scarring of the meat of the lung or the alveoli interstitial portion of the lung." EX 2 at 15.

I accord little weight to Dr. Teiger's opinion that Claimant's pulmonary dysfunction is due solely to his smoking history. His opinion does not account for the objective findings of parenchymal, pleural, and interstitial changes, nor does he explain how these findings would affect his opinion that the etiology of Claimant's pulmonary

impairment is limited to his smoking history. Dr. Teiger's opinion is based partly upon his interpretation of the X-ray he performed, which is the only interpretation of record that finds no abnormalities in the Claimant's lung parenchyma. The doctor's opinion is further undermined by his statement that Claimant was not exposed to asbestos during the last ten (10) years of his employment with Employer, which is in conflict with the record, including Claimant's uncontroverted testimony. EX-1. The doctor's conclusion that the pulmonary study he administered "demonstrated no signs of restrictive lung disease" (EX 1) is contradicted by other medical opinions. Despite the doctor's exemplary credentials of board certification in internal medicine and pulmonary diseases (EX 2 at 5), and his clinical practice treating pulmonary and critical care diseases (Id.; CX-2), I find his opinion not well documented or well reasoned.

In contrast, Dr. Tsiongas concluded that Claimant has "both pleural and some degree of parenchymal asbestos disease". CX-7 at 12. The doctor examined Claimant and noted decreased breath sounds in his lungs. CX-2. Dr. Tsiongas administered a pulmonary function test that he concluded revealed both obstructive and restrictive defects. Id. Dr. Tsiongas testified that he "based [his] conclusion on this gentleman's asbestosis based on the pulmonary function test that [he] performed in the office." CX-7 at 23. The doctor observed that Claimant had significant asbestos exposure that is evident on X-rays and CT scans. CX-7 at 13-14. In his opinion, Claimant's exposure to asbestos contributed to his pulmonary disease. Id. at 15. Dr. Tsiongas explained that even without knowledge of Claimant's employment history, the objective findings suggested exposure to asbestos. Id. at 26. I find Dr. Tsiongas' opinion better documented and reasoned and accord it significant weight.

I discount Dr. Pulde's opinion as neither well-reasoned nor well-documented. The doctor's documentation of five (5) years industrial exposure to asbestos is understated and not consistent with the record. Claimant testified that he was exposed to asbestos in varying degrees throughout the majority of his employment with the Employer. Claimant's description of his work environment and exposure were not controverted by contrary evidence. Dr. Pulde is not a specialist in pulmonary medicine or occupational medicine. EX- 4 at 18. Dr. Pulde did not perform an examination of the Claimant, but rather based his report on documentary evidence. EX 4 at 18. Further, the physician did not actually review any of the Claimant's X-rays, but only reviewed the reports drafted by Drs. Teiger and Tsiongas. EX 4 at 15. For the foregoing reasons, I find that Dr. Pulde's opinion is entitled to less weight.

Although Claimant has a significant smoking history, he has not smoked for at least 13 years. Tr. 40. Claimant has testified to a significant amount of asbestos exposure during his employment with Employer and his testimony was not rebutted. Based on an examination of the entire record, I find that the Claimant has proven that he suffers from an asbestos-related pulmonary disease that was caused by his exposure to asbestos while working for Employer.

EXTENT OF CLAIMANT'S DISABILITY

Claimant seeks compensation for a 50 percent impairment of the whole person. Tr. 15. Dr. Teiger stated in his medical report that Claimant "should probably be given a 40-50% partial disability of the whole person and both lungs." EX 1. When asked to be more specific regarding the percentage of disability, the doctor stated that he "would have no problem considering that [Claimant] had a 50 percent disability." EX 2 at 30. However, the doctor's rating is based upon his conclusion that Claimant's impairment is related entirely to his COPD.

Dr. Tsiongas admitted that he did not establish an impairment rating for Claimant, and testified that he "would be surprised if [his] rating would be too much different than Dr. Teiger's, primarily because this is a functional rating and not necessarily reference to what the cause of this gentleman's respiratory disease was..." CX-7 at 15. Counsel for Employer moved to strike this response, but failed to provide grounds for the objection. Therefore, I decline to sustain the objection, though I accord little weight to this speculative opinion. Accordingly, the record reflects that Dr. Teiger's opinion regarding the extent of Claimant's impairment represents the only evidence of record of a physician's attempt to quantify the degree of Claimant's disability.

Unfortunately, I find Dr. Teiger's opinion does not sufficiently establish the extent to which Claimant may be disabled by his pulmonary impairment. The doctor's evaluation was based entirely upon his assessment of Claimant's impairment as obstructive in nature. Dr. Tsiongas' concurrence with Dr. Teiger's rating is speculative, and even were it not, it is unreliable because Dr. Tsiongas concluded that Claimant's impairment was comprised of obstructive and restrictive components, and the rating was based on an obstructive impairment. The objective evidence supports Dr. Tsiongas' assessment of the nature of the impairment, and, therefore, Dr. Teiger's evaluation of a purely obstructive impairment has little probative value in determining the actual extent of Claimant's pulmonary impairment. Claimant has offered no other evidence, and in fact, relies upon Dr. Teiger's deficient evaluation.

For the reasons stated above, I find that Claimant has failed to sustain his burden of proof, and I must deny his claim.

I further note that Claimant has established that his work place exposure to asbestos caused physiological changes in the lungs. Under section 7 of the Act, Claimant is entitled to reimbursement of "reasonable and necessary" medical expenses. However, Claimant has presented no medical evidence demonstrating that monitoring of his condition is necessary". Accordingly, Claimant has failed to sustain his burden of proving entitlement to reimbursement of medical expenses.

C. Employer's Section 33 Motion to Dismiss is Denied

Employer moved to dismiss the claim under section 33 of the Act. Employer contends that Claimant did not provide the required notice to Employer of his settlement of pending

matters against asbestos manufacturers. Tr. 61. With respect to whether a claimant gave proper notice of settlement and received proper approval for settlement, section 33(g) of the Act provides in pertinent part:

(g)(1) If the person entitled to compensation (or the person's representative) enters into a settlement with a third person referred to in subsection (a) for an amount less than the compensation to which the person (or the person's representative) would be entitled under the Act, the employer shall be liable for compensation as determined under subsection (f) only if written approval of the settlement is obtained from the employer and the employer's carrier, before the settlement is executed, and by the person entitled to compensation (or the person's representative). The approval shall be made on a form provided by the Secretary and shall be filed in the office of the deputy commissioner within thirty days after the settlement is entered into.

(g)(2) If no written approval of the settlement is obtained and filed as required by paragraph (1), or if the employee fails to notify the employer of any settlement obtained from or judgment rendered against a third person, all rights to compensation and medical benefits under this Act shall be terminated, regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this Act.

Before determining whether Claimant has failed to comply with the written approval requirement of § 33(g), it is necessary to establish whether Claimant qualifies as a "person entitled to compensation" under the Act. In *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992), the Court rejected the argument that a "person entitled to compensation" can only be an individual already receiving benefits from their employer or an individual in whose favor a compensation award has been entered. The Court held that under the Act, an injured worker becomes "a person entitled to compensation at the moment his right to recovery vested, not when his employer admitted liability, an event even yet to happen." *Id.* at 477. The Court stated that it is the injury that entitles a person to compensation. *Id.* However, unlike *Cowart* where the Claimant suffered a scheduled injury, the present claim involves occupational disease, namely, asbestosis. Tr. 15. Therefore, the specific date of injury must be proven and cannot merely be asserted as Claimant has done, designating June 26, 2001 as the date of injury. Tr. 15.

The Board held in Harris v. Todd Pacific Shipyards Corp., 28 BRBS 254 (1994) that as a voluntary retiree, a claimant must be aware of the relationship between his asbestos-related disease, his employment and a permanent physical impairment, before he can be found to have an "injury" and thus a vested right to compensation under *Cowart*. The Board has also rejected the assertion that claimant becomes a "person entitled to compensation" at the time of his or her alleged exposure to harmful materials at employer's facility. Gladney v. Ingalls Shipbuilding, Inc. 33 BRBS 1-3 (1999). Dr. Tsiongas was the first physician to diagnose asbestosis. Therefore, I find the date of injury is August 10, 2001, the date of Dr. Tsiongas' medical report and as of this date, Claimant became a person entitled to compensation. Since Claimant is a person entitled to compensation under the Act, section 33 is applicable.

I must then determine whether the amount of the settlement is less than the compensation to which the person would be entitled under the Act. 33 USCS § 933(g)(1)(a). Although Claimant failed to sustain his burden of proof regarding the extent of his impairment, the evidence clearly establishes that had he succeeded, his compensation under the Act would be greater than the sum of his third-party settlements.

The record indicates that the Claimant entered into settlements with three asbestos manufacturers. Employer has submitted three LS-33 forms regarding third party settlements. The LS-33 form approving the settlement between Claimant and Eagle Picket in the amount of \$585 reflects the signature of Douglas Peachy, representative of Employer. EX 6. I find that this form was properly executed and therefore, there is no basis for dismissing the claim based on this settlement. The LS-33 form approving settlement between Claimant and Met Life in the amount of \$1900 was also signed by Douglas Peachy. EX 7. I find that this form was properly executed and therefore, there is no basis for dismissing the claim based on this settlement.

The parties disagree as to the validity of the settlement between H.K. Porter and Claimant in the amount of \$172.50. (CX 9, EX 8). Claimant submitted two letters that were sent to Employer that listed parties with whom H.K. Porter settled. CX-8. However, Claimant's name was not among those listed, and therefore, I may not infer notice to Employer through that correspondence.³

An LS-33 form approving settlement between Claimant and H.K. Porter does not appear to be endorsed by Douglas Peachy, representative for Employer. RX-5. It was signed by Claimant in October, 2003, and an insurer's representative on October 20, 2002. The Deputy Commissioner for OWCP signed it on June 11, 2003. Id. Mr. Peachy's affidavit confirms what is clear from the document itself: he did not sign it before it was submitted to OWCP for signature. Claimant submitted the affidavit of Tracy Vollrath, paralegal at Claimant's counsel's firm. CX 9. In the affidavit, Ms. Vollrath stated that she spoke with Sylvia Adams, an employee of Employer's and Ms. Adams indicated that Employer had approved the H.K. Porter LS-33. CX 9. Ms. Vollrath stated "[she] received a substitute LS 33 on or about January 9, 2004 signed by Attorney Peachy." Id.

Although Ms. Vollrath's statements relating Ms. Adams' comments are inadmissible hearsay, the substitute LS-33 attached to Ms. Vollrath's affidavit is admissible. That form approves the settlement between H.K. Porter and Claimant, and is endorsed with the name of "Douglas Peachy" in handwriting that bears remarkable semblance to the signatures of "Douglas Peachy" that Employer admits are valid. The date noted after that signature is December 23, 2003. Although it appears that Employer has no record of receiving the original agreement that Claimant asserts was sent, the subsequent approval by Mr. Peachy suggests that Employer did not object to the settlement. This, together with Ms. Vollrath's statements that a timely form was

³ It must be noted that I was not provided a copy of the entire letter of March 1, 2000. I have only pages 1 and 18. The names appear to be alphabetically listed. The surnames of individuals listed on the first page begin with "A", and the names on Page 18 start with "W" and end with "Z".

sent to Employer, is persuasive evidence that Employer had notice of the settlement. I find that Mr. Peachy's later endorsement it operates to validate the settlement, nunc pro tunc.⁴

I find, therefore, that Employer was given proper notice as to the H.K. Porter settlement and further find that Employer adequately approved the settlement. Employer's motion to dismiss the claim pursuant to section 33 of the Act is denied.

D. Section 8(f) Relief is Denied

Director submitted a brief arguing that Employer's request for relief under section 8(f) of the Act should be denied. Director asserted that Employer informally raised this issue at a conference on May 28, 2003, but failed to file a timely application for relief. I agree that Employer had ample opportunity to pursue this defense, and failed to timely do so. Employer's request for relief under section 8(f) of the Act is hereby denied.

IV. CONCLUSION

Based upon the foregoing, pursuant to § 8(c)(23) of the Act, Claimant has established that he is disabled under the Act. However, Claimant failed to maintain his burden of proving the extent of his injury, and I, therefore, must dismiss his claim.

ORDER

It is ORDERED:

1. Employer's motion to dismiss the claim under section 33 of the Act is denied.
2. Employer's motion for relief under section 8(f) of the Act is denied.
3. Claimant has established that he is disabled under the Act, but has failed to establish the extent of his disability. In addition, although Claimant is entitled to reimbursement for medical expenses, he has failed to adequately demonstrate their costs. Accordingly, Claimant's claim is DISMISSED.

ATTORNEY'S FEE

Claimant's attorney submitted a claim for attorney's fees. However, Claimant has not successfully prosecuted this claim, and therefore, no fee shall be assessed against the Employer.

A

Janice K. Bullard
Administrative Law Judge

⁴ In reaching this decision, I assigned no probative weight to Claimant's description of a long-standing agreement with Employer regarding the processing of LS-33 forms.

